DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

CACR05-1119

JUNE 21, 2006

BENNY NEWCOMB
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE VAN BUREN COUNTY CIRCUIT COURT
[NO. CR 2002-102]

HON. MICHAEL A. MAGGIO, JUDGE

AFFIRMED

Pursuant to Ark. R. Crim. P. 24.3(b), appellant Benny Newcomb pleaded guilty to manufacturing methamphetamine, possession of methamphetamine, and possession of drug paraphernalia[1], but he reserved his right to appeal the Van Buren County Circuit Court's denial of his motion to suppress evidence. On appeal to this court, appellant raises two points: (1) in an affidavit for a search warrant, an affiant's conclusion that legal items are involved in the process of manufacturing methamphetamine does not amount to probable cause under the Fourth Amendment to the United States Constitution, art. 2, § 15 of the Arkansas Constitution, and the Arkansas Rules of Criminal Procedure; and (2) the statement garnered was the result of the unlawful entry in violation of *Wong Sun v. United States*, 371 U.S. 471 (1963), the Fourth Amendment to the United States Constitution, and art. 2, § 15 of the Arkansas Constitution. We affirm.

Sergeant Randy Murray of the Van Buren County Sheriff's Department submitted the following affidavit when he sought a search warrant for appellant's property:

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[1]The judgment and commitment order reflects that appellant also pleaded guilty to second-degree forgery that was committed on February 12-13, 2002, under docket number CR 2002-59, for which he received a ten-year sentence to be served concurrently with the sentences received as a result of the drug charges.

> That the facts establishing probable cause and grounds for issuance of this Search Warrant are as follows: During the past fifteen (15) days, Affiant Murray has received information from a concerned citizen that Benny L. Newcomb has purchased ephedrine/pseudoephedrine pills, HEET, and Starting Fluid during the evening hours. The concerned citizen advised that Newcomb has purchased these items almost every evening.
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> On July 15, 2002 at approximately 10:35 AM deputies from the Van Buren Co. Sheriff's Department traveled to the Benny Newcomb residence located at 332 Redress Lane in Bee Branch, Arkansas, to attempt to serve a felony bench warrant on Benny Newcomb. Affiant Murray and other officers located Benny Newcomb inside the residence, while placing Mr. Newcomb under arrest Affiant Murray detected a strong chemical odor and observed in plain view items that he believed were items used in the manufacture of methamphetamine, such items being Red Devil lye, solvents, propane torch, and other paraphernalia.

On July 15, 2002, the magistrate found probable cause for the issuance of a search warrant. Police officers immediately executed the warrant and seized over a dozen incriminating items. Following his arrest, appellant waived his Miranda rights and wrote the following statement at the police station:

> I have been using meth for about fifteen years. I have purchased pills & other items to cook meth. I have tried to cook it but haven't been able to get the cook right. I have tried a couple of times. I have watch Jackie & thought I could cook it. The items that was at the house was product (left overs) from a previous cook. I was trying to powder it out a second time to get some personal use. My son Michael gave it to me. I have a problem with meth & need help getting off of the stuff. Michael has brought me left over cooks about three different times so I could powder it out. All the items in the house was mine. Brenda is just a user, she doesn't know nothing about it. I have purchased pills, ether, lye, Batteries, iodine, Dry ice. I have been praying that I would get some help & I guess this is the way I am suppose to get help.

Appellant and the State moved for a joint stipulation that witnesses would testify to the facts set out in the various exhibits, including the affidavit for the search warrant, the search warrant itself, and the search-warrant return. In lieu of a hearing, both parties agreed to submit bench briefs of their arguments regarding the suppression issue. The trial court granted the parties' motions, and at a pretrial hearing held on March 3, 2005, the trial court ruled that it was "a close case" but that the magistrate had enough information before him to issue the search warrant. Appellant entered a conditional plea on March 23, 2005. At the plea hearing, the trial court clarified its earlier ruling by stating that, even if the first paragraph of the affidavit were excised because there was no time frame as to when the concerned citizen actually saw the events reported, under the totality of the circumstances, issuing the search warrant was proper.

In reviewing the trial court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court and proper deference to the trial court's findings. *See Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004). We reverse only if the ruling is clearly against the preponderance of the evidence. *Chrobak v. State*, 75 Ark. App. 281, 58 S.W.3d 387 (2001).

Under the totality-of-the-circumstances analysis, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including

the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place. *See Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001). The duty of a reviewing court is simply to ensure that the magistrate has a substantial basis for concluding that probable cause existed. *See Winters v. State*, 89 Ark. App. 146, ___ S.W.3d ___ (2005). At the outset, we note that, at both the trial-court level and on appellate review, appellant simply cites the United States and Arkansas constitutions but did not then and does not now develop any argument regarding the relevant provisions of those constitutions. He likewise makes no specific argument regarding the Arkansas Rules of Criminal Procedure. Because appellant failed to develop any of these so-called arguments, we decline to address them from those particular perspectives and essentially develop his arguments for him. *See*, *e.g.*, *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003).

As a preliminary matter, appellant points out that the State impermissibly references the first paragraph of the affidavit in its brief even though the trial court specifically did not rely upon it. We agree with appellant. It is the uniform rule that some mention of time must be included in the affidavit for a search warrant unless it can be inferred from other information in the affidavit. *See George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004). Time is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant. *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985). Although Murray stated that he received information within the previous fifteen days, there was no indication as to when the concerned citizen saw appellant making suspicious purchases. Accordingly, we give the first paragraph no consideration whatsoever.

Appellant contends that a strong chemical odor is not sufficient to establish probable cause for the issuance of a search warrant. We agree. The smell of a legal or noncontraband substance, *standing alone*, is insufficient to support a finding of probable cause. *Bennett v. State*, 345 Ark. 48, 44 S.W.3d 310 (2001) (emphasis added). Appellant further avers that the items he possessed, namely, the Red Devil lye and a propane torch, are legal items with legitimate uses. While that is true, Murray saw the otherwise legitimate items in conjunction with the smell of a strong chemical odor. *See*, *e.g.*, *Stephenson v. State*, 71 Ark. App. 254, 29 S.W.3d 744 (2000) (holding that probable cause to issue a warrant was shown by affiant's stated facts that appellant purchased an unusual amount of starter fluid, that she stated a preference for a brand with a high ether content, and that the smell of ether emanated from her residence). Finally, appellant maintains that the affiant's conclusory statement that the items were used in the manufacturing of methamphetamine is insufficient to support the issuance of the search warrant because the affiant did not set forth his experience and training regarding the manufacturing process. The failure to include some mention of the affiant's experience does not render the search warrant invalid given the totality of the circumstances.

An affiant's experience, training, and special knowledge are simply factors that an issuing magistrate may consider. *See McCormick v.* State, 74 Ark. App. 349, 48 S.W.3d 549 (2001).

In any event, when an officer relies in good faith on a search warrant that is later determined to be unsupported by probable cause, any evidence discovered by reason of that search will not be suppressed. *Yancey v. State*, *supra*. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. *Id*. Even assuming that probable cause was lacking, we hold that the officers here acted in good faith.

Relying on *Wong Sun v. United States*, *supra*, appellant argues in his second point on appeal that his statement was the result of the illegal search warrant executed and that the statement and all other evidence should accordingly have been suppressed. If the evidence to which objection is made has been obtained by exploitation of a primary illegal police action rather than by means sufficiently distinguishable to be purged of the primary taint, it is to be excluded as "fruit of the poisonous tree." *Id*. Because we have held that probable cause existed for issuance of the search warrant, *i.e.*, there was no primary illegal police activity, we need not address appellant's second point.

Affirmed.

ROBBINS and BIRD, JJ., agree.